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Neutral Citation No. -2024:AHC-LKO:77795-DB

Court No. - 9

Case :- WRIT - C No. - 23742 of 2020

Petitioner :- M/S K.M. Sugar Mills Ltd.Thru. Authorised Signatory

Respondent :- State Of U.P.Thru.Secy. Housing and Urban Planning Lko. And Ors.

Counsel for Petitioner :- Rahul Kumar,Himadari Batra

Counsel for Respondent :- C.S.C.,Ratnesh Chandra

Hon'ble Mrs. Sangeeta Chandra,J.

Hon'ble Shree Prakash Singh,J.

1. This Writ Petition, namely, Writ-C No.23742 of 2020 has been filed praying for quashing of order dated 04.04.2019 passed by the Vice-Chairman, Lucknow Development Authority, after summoning the same from the respondents. By such order, the building plan of the petitioner was rejected. It also prays for quashing the consequential order dated 11.04.2019 passed by the respondent No.6 Executive Engineer, Map Cell, Lucknow Development Authority, intimating the petitioner about the rejection of building plan, and the order dated 26.11.2019 passed by the Under Secretary, Government of U.P., Department of Housing and Urban Planning refusing to give benefit of setback to the petitioner and the order/ advice dated 20.09.2019 issued by the Advisor, Planning, Awas Bandhu, giving an adverse report regarding admissibility of relaxation of norms.

2. It is the case of the petitioner that the Lucknow Development Authority issued an Auction Notice on 02.12.2017 proposing to sell commercial plots in Gomti Nagar. The petitioner participated and was declared successful with respect to Plot No.CP – 1, Vineet Khand 5, Gomti Nagar, Lucknow having an area of 1550 m². After formalities were completed an Agreement to Sell was signed on 15.10.2018, and registered on 22.10.2018, in favour of the petitioner for CP Plot No.1, measuring 1550.40 m² having roads on all four sides. As per Clause (9) of the terms of the Agreement to Sell, the petitioner was to raise construction on the commercial plot within a period of five years from the date of getting approval of the building plan and the permits from the various departments. As per Clause 14 of the agreement ground coverage allowed to the petitioner was 60% and Floor Area Ratio (hereinafter referred to as 'FAR') was 1.5 in respect of the plot in question. The petitioner accordingly uploaded a building plan online in respect of the plot in November, 2018 and paid the necessary fee. The building plan had proposed 56% ground coverage which was within the permissible and approved limit of the Lucknow Development Authority. The respondent No.6 sent a letter on 10.12.2018 to the petitioner highlighting certain deficiencies, but in such letter there was no whisper about boundary setbacks not being respected. The petitioner removed the deficiencies and submitted amended plan on 10.12.2018 itself. Since no approval was given the petitioner wrote to the Lucknow Development Authority on 09.01.2019, referring to Clause 14 of the Agreement to

Sell and pointed out that the petitioners plot was an island plot having roads on all four sides. Since the Executive Engineer had proposed application of clause No.3.4.2 (1) and comment (1) of the Bhavan Nirman Evam Vikaas Upavidhi(hereinafter referred to as 'the building bye-laws'); the petitioner in the said letter brought to the notice of the authority that the proposed setback as per clause 3.4.2(1) would make it impossible for the petitioner to achieve the approved ground coverage of 60%. If the setback proposed by the respondent No.6 is applied, the petitioner would only achieve ground coverage of 43.15%. By a letter dated 16.01.2019, the Executive Engineer for the first time informed the petitioner that the layout plan of Vineet Khand-5 had not yet been prepared and hence the setback has to be as per the building bye-laws. As per the report of the Planning Department, the setback was to be 6 metres on the South, East and West side of the plot and 3 m on the North side of the plot. On 06.03.2019, another letter was written by the Executive Engineer, reminding the petitioner of the necessity to submit amended building plan as per building bye-laws and in case such deficiencies were not removed within week from receipt of letter, the building plan would be rejected.

3. It has been stated that the Executive Engineer applied clause 3.4.2 (1) of the building bye-laws wrongly as the plot allotted to the petitioner was an island plot and not a corner plot. Only corner plots were to have rear setback equal to that of the front setback. A copy of the building bye-laws has been filed as Annexure 11 to the writ petition.

4. Even before the petitioner could submit a reply, the Executive Engineer by the letter dated 11.04.2019 intimated to the petitioner that the building plan was rejected by the Competent Officer i.e. the Vice Chairman, Lucknow Development Authority on 04.04.2019. The order dated 04.04.2019 was not enclosed to the letter dated 11.04.2019 and such order passed by the Vice-Chairman, Lucknow Development Authority has not yet been served upon the petitioner. It has been submitted on the basis of Annexure-11, the building bye-laws, that plots above 500 m² must have front setback equal to rear setback, and the side setback was to be half of the front setback, but, it was suggested by the Executive Engineer (Map Cell) that the petitioner should leave 6 m on the front and 6 m on each of the two sides and 6 m at the back.

5. It has been argued by the learned Senior Counsel appearing for the petitioner that the whole purpose of buying the commercial plot is defeated as hardly any space was left for raising a viable construction to the petitioner and only 43% of ground coverage was permitted by the Executive Engineer by suggesting such setback on all four sides. The petitioner had been permitted ground coverage of 60% as per Clause 14 of the Agreement to Sell. It has been argued that for an island plot, purpose of setback is achieved by roads on all four sides for ventilation, sunlight, and fire fighting arrangements. It has also been argued that neither in the layout plan, filed at page 96, nor in the map appended to the Sale Agreement at page 70, setback has been provided by the Lucknow Development Authority.

There is no provision of setback for island plot in building bye-laws either, copy of which has been filed as Annexure-11 to the petition.

6. It has been argued that after the intimation dated 11.04.2019 was received by the petitioner, it has made several representations to the Vice Chairman, Lucknow Development Authority and to the Secretary, Lucknow Development Authority and also to the Executive Engineer concerned. In response to one of such representations, the Secretary, Lucknow Development Authority has referred the matter to the Special Secretary, Housing and Planning Department on 01.08.2019 and sought instructions. In the said letter, it was informed to the Government that the approved ground coverage as per Agreement to Sell of commercial plot No.1 at Vineet Khand phase-5 was 60%, and he referred to Clause 3.4.2 (1), comment (1) of the building bye-laws which dealt with corner plots and not with island plots.

7. The Secretary, Government of U.P. by a letter dated 28.08.2019, also sought advice from the Chief Town and Country Planner, Town and Country Planning Department, Government of U.P. (hereinafter referred to as "C.T.C.P.") with respect to the issue of setback on an island plot. The C.T.C.P. by his letter dated 02.09.2019 addressed to the Under Secretary, Housing and Urban Planning Department submitted a report that the total area of the plot was 1550 m² and the map of the area drawn up by Lucknow Development Authority did not have any setback defined,

and the building bye-laws would apply in such a case. Clause No.3.4.2 (1) of the bye-laws as amended from time to time relating to a commercial building having area of more than 500 m² were applicable. Since the plot in question was 1550 m², it would have to leave a setback of 6 m on the front, and 3 m on each of the two sides and 3 m on the rear. It is only corner plots which have to leave rear setback equal to the front setback. Since the petitioners commercial plot was not a corner plot, but an island plot, the C.T.C.P. requested the Government to provide accordingly by amending the bye-laws as it was evident from the draft layout plan prepared by the Lucknow Development Authority that there was a 9 m road on the North, a 9 m road on the West, a 12 m road on the South, and a 9 m road on the East side of the plot. There was no separate provision for such island plot in the building bye-laws and looking into its location, a setback of 6 m on the front, 3 m on the back and 3 m on each side would be appropriate. This would enable the petitioner to have ground coverage of 60% with FAR of 1.5.

8. It has been argued that after deriving knowledge about the report of the C.T.C.P., the petitioner wrote to the Government but did not get any reply. All of a sudden, it received information that by letter dated 26.11.2019, the Government had disapproved giving any concession. Such order dated 26.11.2019 (Copy of which has been filed as Annexure 17 to the petition was passed by the Under Secretary, Housing and Urban Planning Department). The petitioner having received such information made a

representation to the Additional Chief Secretary, Housing and Urban Planning Development on 14.01.2020, which has not yet been replied to by any Competent Officer.

9. It has been argued by Sri Sudeep Seth, learned Senior Advocate, that at the time of auction of the commercial plots, the setback of the plots was not disclosed by the Lucknow Development Authority. The Lucknow Development Authority had in its own letter dated 06.01.2019 admitted that the layout plan of Vineet Khand, Phase 5 had not yet been finalised and the petitioners' building plan has been rejected only on application of clause 3.4.2(1) of the building bye-laws which referred to corner plots only and not to island plots.

10. It has been argued that Lucknow Development Authority had permitted 60% ground coverage and FAR of 1.5 in the Agreement to Sell, and it cannot be allowed to resile from the terms of the agreement at a later stage. The petitioner was not provided any opportunity of hearing before the Vice-Chairman rejected its building plan on 04.04.2019. The order dated 04.04.2019 was not even served on the petitioner. The C.T.C.P. had recommended in its report dated 02.09.2019 that the Government could give a concession as the petitioner's plot was not a corner plot but an island plot, but the Under Secretary to the Government has passed an order dated 26.11.2019 arbitrarily rejecting the suggestion given by the C.T.C.P. Although against rejection of building plan, the petitioner has remedy of filing an Appeal under the provisions of the

U.P. Urban Planning and Development Act 1973, such Appeal to the Chairman/ Commissioner of the Division would be meaningless as the Government itself has rejected the report of the C.T.C.P. and refused to give any concession to the petitioner.

11. To buttress his arguments regarding non-efficacy of statutory remedy, the learned counsel for the petitioner has placed reliance upon judgement rendered by the Supreme Court in *Magadh Sugar & Energy Ltd. Vs. State of Bihar and others*, 2022 (16) SCC 428, where the Supreme Court summarized the law with regard to entertaining of writ petitions under extraordinary jurisdiction by the High Court, despite availability of statutory remedy.

12. The Counsel for the petitioner has placed reliance upon paragraphs- 20 and 23 of the judgement, which are as follows:–

“20. While High Court would normally not exercise its jurisdiction under Article 226 of the Constitution if an effective and affectations alternative remedies is available, the existence of an alternative remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallised by this court in Whirlpool corporation Vs. Registrar of Trade Marks, 1998 (8) SCC 1, and Harbanslal Sahnia Vs. Indian Oil Corporation Ltd., 2003 (2) SCC 107. Recently, in Radha Krishan Industries Vs. State of Himachal Pradesh, 2021 (6) SCC 771, a two-judge Bench of the court of which one of us was a part of (D.Y. Chandrachud, J.) has summarised the principles governing the exercise of jurisdiction by the High Court in the presence of an

alternative remedy. This court has observed: (Radha Krishan Industries case, 2021 (6) SCC 771 SCC p. 795, para 27)

“27. The principles of law, which emerge are that:

27.1. the power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternative remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternative remedy arise where:(a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternative remedy by itself does not divest the High Court of its power under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule

of exhaustion of statutory remedies is a rule of policy, convenience, and discretion.

27.6. *In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.*

(emphasis supplied)

“23. In Union of India Vs. State of Haryana, 2000 (10) SCC 482 the assessing authorities imposed sales tax on the rentals charged for supply of Telephones. Writ petitions were filed in the High Court challenging the levy. The writ petitions were dismissed on the ground that an alternative remedy of a statutory appeal was available. An appeal against these orders was filed before this court. The appeal was allowed, and the matter was remanded back to the High Court for determination since it involved a question of law on whether the supply of Telephones amounted to sale.”

13. Sri Ratnesh Chandra, the counsel for the Lucknow Development Authority has relied upon the counter affidavit filed in July, 2021 on behalf of the respondent nos. 4 to 7, by the Executive Engineer (MAP Cell). It has been pointed out that the plot in question is an island plot and keeping in view that there are no bye-laws with respect to such properties defining the setback required to be followed, the matter was referred to the State Government for decision, and it has already taken a decision. The petitioner has an option to raise additional floors by

increasing the height of the proposed building to achieve FAR of 1.5, but the petitioner has to leave the set back on all four sides as indicated to avoid any mishappening due to fire, gas leakages, stampede, and other such emergency situations. There existed no guidelines with respect to an island plot, which has a corner on all four sides. The ground coverage of 60% as mentioned in the sale agreement is relevant for only those properties which share a common boundary with other properties, but for an island plot, the petitioner can achieve the FAR value by constructing a taller building. The counter affidavit has placed reliance repeatedly on the report of the Chief Town and Country Planner dated 02.09.2019. It has also been mentioned in the counter affidavit that despite several letters being sent to the petitioner for making rectification/amendment in its draft building plan, the petitioner did not respond, as a result, the building plan was cancelled by the Vice Chairman on 04.04.2019. The C.T.C.P. in his letter dated 02.09.2019 had made it clear that there existed no clause in respect of plot of the petitioner in the building bye-laws, and therefore, suggested that the matter be placed before the Board by inviting objections and after their disposal, the final decision should be taken by the State Government, which would be binding. Now that the State Government has taken the decision. The discretion of the Lucknow Development Authority ceased to operate.

14. In the rejoinder affidavit, the petitioner has disputed the option allegedly said to be available to it to raise further floors and the height of the construction on the

ground that as per the building bye-laws, the petitioner can raise only four floors and height of the building was limited up to a maximum of 15 m only looking at the width of the road in front of the construction. Also in case 6 m is left on both sides, the building shall become narrow in breadth and unviable for all practical purposes. Also, it has been stated that the letter dated 06.01.2019 sent by the Executive Engineer, (Map Cell) was replied by the petitioner promptly on 09.01.2019. The letter dated 10.12.2018 sent by the Executive Engineer, Map Cell was replied to on 10.12.2018 itself. The deficiencies pointed out were promptly rectified. However, there was no mention of the need to provide for setbacks. Such information was given only in letter dated 06.03.2019 sent by the Executive Engineer (Map Cell), which was merely a repetition of the earlier letter dated 09.01.2019, and therefore, it cannot be said that the petitioner did not care to rectify/amend the building plan as suggested by the Executive Engineer. Also the Lucknow Development Authority has relied upon the report of the C.T.C.P. dated 02.09.2019 and in paragraph-6 of the said report, the C.T.C.P. has clearly stated that the plot in question is not a corner plot, but it is an island plot, having suitable entry and exit areas for fire engines and, therefore, suitable concession can be granted by the State Government.

15. It appears that after the writ petition was filed, only the respondent Nos.4 to 7 had filed counter affidavit. No counter affidavit was filed by the State Government and this Court by its order dated 07.12.2020 directed that

personal affidavit be filed by the respondent No.1, and the respondent No. 5, the Vice-Chairman of the Lucknow Development Authority containing para-wise reply to the writ petition. In pursuance of order passed by this Court, a counter affidavit was filed on 07.08.2021 sworn by the Principal Secretary, Housing and Urban Development. In the said counter affidavit, it was stated that the Secretary Lucknow Development Authority by his letter dated 01.08.2019 addressed to the Special Secretary, had sought instructions relating to the petitioner's dispute regarding setback of the plot in question. The Government of U.P. through its letter dated 28.08.2019 sought a report from the C.T.C.P. and also from the Advisor (Planning) Awas Bandhu. The C.T.C.P. submitted his report to the Government on 02.09.2019. The Advisor (Planning) Awas Bandhu submitted its report on 20.09.2019. Taking into account both reports, a conscious decision was taken by the State Government and instructions were given to the Vice Chairman, Lucknow Development Authority, on 26.11.2019 stating that it was not proper to grant any relaxation after the auction process had been finalized, and that the Lucknow Development Authority should clarify about the setback in accordance with the rules relating to the type of plot which was being bought by the petitioner at the time of the auction itself.

16. In the counter affidavit filed on 07.08.2021 on behalf of the State Respondent, a copy of the advice given by the Adviser (Planning), Awas Bandhu was filed as annexure C3. A rejoinder to the said counter affidavit was filed on

25.08.2021 by the petitioner along with an application for amendment of the petition, proposing to add paragraphs 63 A to 64 F to the petition and also a prayer clause challenging the report of the Advisor (Planning), Awas Bandhu dated 20.09.2019 and also for impleading Advisor (Planning) Awas Bandhu as Respondent No. 8. Such amendment was allowed to be incorporated in the petition by this court by its order dated 07.01.2022.

17. In paragraph-63 A to paragraph- 64F the petitioner has stated that in the Agreement to Sell executed between the parties, the plot in question has been described with boundaries showing 9 m wide roads on the north, east and west and 12 m wide road on the South. There is no dispute regarding the plot in question not being a corner plot but an island plot with roads on all four sides. The Advisor, Awas Bandhu in his report dated 20.09.2019 has given an incorrect report. Also, the Government has ignored the suggestion of the C.T.C.P. that since there is no provision for setback provided in the building bye- laws for an island plot, the Government can relax the norms which are not strictly applicable even otherwise to the plot in question.

18. In the counter affidavit filed by the respondent Nos. 4 to 7 to the amended petition, it is stated that the petitioner's plot is an island plot and has four corners and, therefore, setback is necessary to be left on all four sides for the purpose of proper air, light and ventilation, and to allow traffic on the roads to remain unobstructed once the construction is completed. The driver of a vehicle on the

road may not easily see the turning point on the road after the building is raised, which may lead to possibility of accidents.

19. In the rejoinder to such counter affidavit, the petitioner has stated that neither passage of light nor air will be obstructed if setback as suggested by the C.T.C.P. of 3m on both sides and on the rear is left along with front setback of 6m.

20. This Court while hearing the petition had passed an order on 25.04.2024 noting the arguments raised by the learned Senior Advocate for the petitioner regarding the report of the C.T.C.P. and of the Awas Bandhu, which had mentioned that there is no provision in the bye-laws with regard to setback to be observed in case of island plots. The Court noted that the C.T.C.P. had recommended amendment of the bye-laws to provide for relaxed norms and that the petitioner had no quarrel with such advice of the C.T.C.P. as in any case, it would have to leave some land on each side of the building for utilities. Instead of following the advice/opinion of the C.T.C.P., the Government had asked for advice from Awas Bandhu and inexplicably stated that no relaxation can be given in the setback provision in commercial plots as they had been allotted by auction and in the auction, the conditions were mentioned which cannot be changed by giving such relaxation. The Court noted that the Advisor Awas Bandhu had not mentioned as to what was the condition during the time when the auction was held of the commercial plot, but

it had been stated that there was no provision for relaxation in the terms and conditions of the Tender Notice inviting bids and, therefore, no relaxation could be considered by the State Government at this stage. The Court noted that Awas Bandhu advice has been taken over and above that of C.T.C.P. The Awas Bandhu had no role to play insofar as relaxation in conditions of the bye-laws or in any other matter is concerned. The Awas Bandhu had no statutory existence independent of the Government. The Government had to act in accordance with the bye-laws and the power of relaxation had been given to the Government under the Statute, and it could not be governed by any condition of the Tender Notice.

21. This Court had given time to the learned Standing Counsel to seek instructions as to why the advice of the C.T.C.P. had been ignored and that of the Advisor Awas Bandhu taken as gospel truth by the Government as there was no mention in the counter affidavit regarding the statutory nature of Awas Bandhu. A short counter affidavit was filed thereafter under the signatures of the C.T.C.P., which mention that Awas Bandhu was constituted as a society and registered under the Societies Registration Act and was working under the Department of Housing and Urban Planning. The patron of Awas Bandhu was the Honourable Governor/Honourable Chief Minister and all the members of the Working Committee were officers of the State Government. Initially, it was registered as Nirman Bandhu in February, 1997 but later on in 07.06.1997, it was renamed Aawas Bandhu. A copy of the Office

Memorandum issued by the Awas Anubhag -1 dated 05.02.1997 was filed as annexure mentioning the new Housing Policy of the Government and the need for private investment by Developers. In addition to 24 Development Authorities constituted for 24 towns and U.P. Awas Vikas Parishad to facilitate Planned Development of Housing facilities in urban areas the Government felt the need to constitute Nirman Bandhu/ Awas Bandhu to act as a facilitator in the same manner as it had constituted Udyog Bandhu to facilitate industrialization in the State of U.P.. A copy of Corrigendum issued on 07.06.1997 has also been enclosed with the said short counter affidavit.

22. When the matter was taken U.P. on 02.05.2024, this Court granted time to the State respondent to file a supplementary counter affidavit, explaining why the Government had referred the matter to the Awas Bandhu and the competence of the Awas Bandhu to give an opinion in the matter relating to building bye-laws of the Lucknow Development Authority. A supplementary counter affidavit was filed thereafter. The Court in its order dated 17.05.2024 directed the petitioner to bring on record the terms and conditions of the Tender Notice by which the plot in question was advertised. In the supplementary counter affidavit filed by the State Government, it had been stated that it could not go against the terms and conditions nor modify the terms and conditions of the Auction Notice after the bid had been accepted.

23. In the supplementary affidavit filed by the petitioner, it has brought on record the advertisement published in daily newspapers on 02.12.2017, informing the public about the date of auction of commercial plots in question which was to be held on 09.01.2018. A copy of the Tender Form along with Terms and Conditions of the Tender Notice dated 02.12.2017 have also been filed. It has been pointed out by the learned Senior Advocate that Clause 5 and 20 of the Tender Notice stipulated that the construction over the plots in question shall be in accordance with the Master Plan and the building bye-laws prevalent at the relevant time. It was also argued that the petitioner was ready to accept the C.T.C.P. report dated 02.09.2019 and to develop the plot in questions strictly in accordance with clause 3.4.2(1) of the building bye-laws of 2008 and the Sale Agreement dated 15.10.2018, registered on 22.10.2018. The petitioner is not seeking any kind of relaxation with respect to the plot in question but only requesting for 60% ground coverage and FAR to be 1.5 in accordance with the terms and conditions of the sale agreement.

24. Having heard the Senior Counsel for the petitioner and also the counsel for the respondents, we have examined pleading on record and the Annexures filed along with various affidavits by the parties. As per the Agreement to Sell signed between the respondent Nos. 4 to 7 and the petitioner, the total cost of 1550.40 m² commercial plot in Vineet Khand, Phase-5 was calculated at 6.42 crores of which 2.71 crores were deposited by the petitioner and the rest of the amount was to be deposited in 18 quarterly

instalments commencing from 15.10.2018. The interest at the rate of 16% per annum, would be charged in case of failure to deposit any instalment within time. On deposit of the entire instalments by 15.01.2023 by the purchaser, a final costing would have to be done and the amount if any found due was also to be paid by the purchaser. Actual physical possession of the plot was to be handed over to the purchaser on execution of the Agreement to Sell and the purchaser had to start and complete the construction in accordance with the building plan approved by the Lucknow Development Authority, within five years of such approval or within such a period as the rules may permit. The ground coverage of 60% and floor area ratio 1.5% would be permissible as per the rules. The setback as given in the building bye-laws of 2008, as amended from time to time had to be respected. The height of the building would also be in accordance with the building bye- laws. Several other conditions relating to fire fighting NOC, earthquake resistant construction, parking spaces, et cetera, were also given in the said agreement with the right to cancel allotment in case of failure to deposit any of the installments or in case it was found that such allotment had been obtained by fraud being reserved with the Vice-Chairman of the Lucknow Development Authority. The schedule of property as given in the Agreement to Sell showed 9m wide roads on the North, East and West of the commercial plot in question and 12 m wide road on the South. The map attached with said Agreement to Sell showed an irregular/ scalene quadrilateral with an average 24 m width and 64 m length. Initial objection to the

building plan submitted online communicated by letter dated 10.12.2018 did not relate to setbacks but mentioned other shortcomings which needed to be removed. By letter dated 06.01.2019 the Executive Engineer (Map Cell) indicated that layout plan for Vineet Khand 5 had not been finalized and the building was to be as per building bye-laws. As per the building bye-laws a front and rear set back of 6 m each and two side setbacks also of 6 m each was proposed by the Planning section and it also inexplicably indicated 6 m wide setback on the South, East and West of the plot in question and 3 m in the North. Letter dated 06.03.2019 repeated the same requirements specified in the clause 3.4.2(1) of the building bye-laws which were being relied upon. The petitioner had submitted a reply to the letter dated 06.01.2019, indicating that in case front and side setback as was being proposed by the Planning Department was to be followed, then ground coverage would be only 43.15%. It requested for a reconsideration of the matter.

25. The building bye-laws of 2008, as amended from time to time have been filed as Anneuxre- 11 to the petition and having gone through paragraph 3.4.2 (1), this Court has found that for commercial plots having an area of more than 500 m² a front side back of 6 m and a rear and side setback of 3 m each has been provided, however, in the comment (1) of such a provision, mention has been made of the requirement of having equal setback for the front and rear in corner plots, meaning, thereby 6 m had to be left as the front and the rear setback.

The letter dated 11.04.2019 challenged in the writ petition is only an intimation by the Executive Engineer (Map Cell) to the petitioner that its building plan has been rejected by the Competent Authority on 04.04.2019. In pursuance to the representation being made by the petitioner in this regard the Secretary Lucknow Development Authority wrote to the Special Secretary, Housing and Urban Planning Department regarding the absence of any provision for relaxation in setback provided in the bye-laws for commercial plots, although there was a provision for relaxation of setback norms in special circumstances by the Lucknow Development Authority Board in residential plots. The letter dated 01.08.2019, deliberately mentioned the plot in question to be a corner plot although it was evident from the map attached to the Agreement to Sell, and the building plan submitted by the petitioner, that it was an island plot surrounded on all four sides by 9 m and 12 m wide roads.

26. The matter was referred to the C.T.C.P. by the Government on 28.08.2019 and taking into account the details mentioned by the planning department of the Lucknow Development Authority in its letter dated 01.08. 2019, the C.T.C.P. clarified the position with respect to paragraph 3.4.2 (1) of the building bye- laws with respect to a four storyed building building with a maximum height of 15 m to be constructed on a commercial plot of more than 500 square metres. There was a provision for a front setback of 6 m and side and rear setback of 3 m each. In case the plot was a corner plot, then front and rear

setbacks had to be equal to each other. The C.T.C.P. also clarified that the plot in question was surrounded on all four sides by roads and was not a corner plot, but in fact, an island plot and there was no provision in the building bye-laws with regard to setback provided for an island plot. It also referred to the necessity of providing setback only to ensure sunlight and ventilation and easy access during emergencies like in case of fire. In paragraph-6 of the letter dated 02.09.2019, mention was made of the possibility of considering a provision of 6 m front and 3 m rear setback with 3 m setback on both sides, but for making such provision, the Lucknow Development Authority Board had to make a proposal and invite objections and dispose of the same and then refer the matter to the State Government. Also, the State Government would have to make suitable amendments in the building bye-laws on such proposal of the LDA's Board. It appears that after receipt of such report by the C.T.C.P., the Government asked for a report from Awas Bandhu, U.P. arrayed as respondent No. 8 to the petition. The Advisor (Planning) Awas Bandhu referred to the letter of the Secretary, Lucknow Development Authority dated 01.08.2019, and the direction of the Government to submit its comments.

27. In its letter dated 20.09.2019, three reasons have been given for rejection of proposal made by the Secretary Lucknow Development Authority. Firstly, it has been mentioned that in all Schemes where layout plan had already been approved by the Competent Authority, setback had to be strictly in accordance with the layout

plan as any relaxation/change therein would affect the building line of the adjacent plots as well. Secondly, in the building bye-laws, there was no provision for relaxation of provision of setback in case of commercial plots. Thirdly, since the commercial plot had been allotted by auction, any post bid change in the setback would be impermissible.

28. We have also gone through the advertisement/Tender Notice published in the newspapers by the Lucknow Development Authority, inviting bids for commercial plots as well as shops in various sectors of Gomti Nagar. Such notice mentions that construction would be under the provisions of the Lucknow Master Plan of 2021 and the prevalent building bye-laws. The height of a building to be constructed on such commercial plots would also be subject to clearance by the Airport Authority. Besides other conditions being mentioned relating to solvency certificate and income tax returns and submission of Memorandum and Articles of Association, in case of registered society/corporations and relating to reserved price, and earnest money being deposited before submission of bids and 25% of the bid amount being deposited at the fall of the hammer and the 25% being deposited within one month of allotment letter being issued and the remaining 50% being deposited in quarterly installments with 13% simple interest and the highest bid being subject to approval by the competent authority have all been mentioned; three other terms and conditions, which are mostly related to the manner in which the auction would be held and the manner in which approval would be given by

the Vice Chairman on submission of highest bid have also been given. Paragraph 20 of such terms and conditions only says that construction has to be carried out in accordance with the Lucknow Master Plan and the building bye-laws, after due approval by the Lucknow Development Authority. The height of the buildings to be constructed had to be approved by the Airport Authority.

29. We have examined carefully the Office Memorandum No. 429/9-Aa-1-1997, dated 05.02.1997 filed as Annexure to the short counter affidavit sworn by the C.T.C.P., it refers to 24 Development Authorities constituted under the U.P. Urban Planning and Development Act 1973, and Awas Vikas Parshad having been constituted under the U.P. Awas Vikas Parshad Adhiniyam 1965 and their role in planned development of urban areas. It also refers Navin Rajya Awas Neeti and the emphasis of such Development Authorities and Awas Vikas Parishad shifting from being developers to that of facilitators. A need was felt for establishment of a one stop solution to promote Urban Development in the nature of a problem solver like Udyog Bandhu had been constituted for promoting industrialization in the State of U.P. Consequently, Nirman Bandhu was proposed to be constituted to resolve problems arising out of development initiatives taken by private developers, and for encouraging such private developers as well as Development Authorities and Awas Vikas Parishad to enforce urban development schemes without much difficulty. The constitution of the Working Committee of Nirman Bandhu has been given in paragraph

2 of the said Office Memorandum and it mentions the Honourable Governor / Honourable Chief Minister as the Patron and Principal Secretary of Housing, along with Secretaries, Urban Development, Revenue, Finance, Institutional Finance and Housing Commissioner, Awas Vikas Parishad, and Vice-Chairman of Development Authorities nominated by the State Government and two reputed Developers/ representatives of Chamber of Commerce as its members.

30. In the Corrigendum issued on 07.06.1997, the name Nirman Bandhu was changed to Awas Bandhu and the Working Committee's constitution also underwent a change with the Hon'ble Housing Minister as its Chairperson and the Chief Secretary, Government of U.P. as its Vice Chairperson with Principal Secretary Energy, also being included as members, besides the earlier existing members, one Mayor to be nominated from a Municipal Corporation by the Government, one builder, one architect and one more person having made remarkable contribution in the field of urban development had to be nominated by the Government. The corrigendum also delineated the area of operation of Awas Bandhu, which included encouragement of investment in Housing, acting as a single window for approval of big Housing projects by all relevant departments in one meeting, providing guidance to urban development authorities and promoting private sector investments in housing projects, removing difficulties being faced by private sector investors in housing projects, preparing policy papers for training, and other related

issues in the housing sector and holding monthly meetings for removal of difficulties being faced by private sector in the enforcement of housing schemes being promoted by them.

31. The question of law that has been framed by the learned Senior Counsel is with regard as to whether the Advisor (Planning) Awas Bandhu was competent to give any advice with regard to a matter relating to sanction of a Building Plan by the L.D.A. for a commercial building and not a Housing Scheme. It has been argued by the learned Senior Counsel that Awas Bandhu has been constituted by the State Government by means of an Office Memorandum only for different purposes altogether that are mentioned in Office Memorandum dated 05.02.1997 and 07.06.1997. Both these Office Memorandum do not in terms provide anywhere that Awas Bandhu would also provide the State Government advice with regard to a matter which is otherwise within the domain of Vice-Chairman and the LDAs Board. The C.T.C.P. on the other hand is a an ex-officio member of the LDA Board. The Senior Counsel referred to Section 4(3) of the U.P. Urban Planning and Development Act, which refers to the Constitution of the Board.

32. Section 4 (3) of U.P. Urban Planning and Development Act, 1973 reads as under:-

“(3) The Authority in respect of a development area which includes the whole or any part of a city as defined in the Uttar

Pradesh Municipal Corporations Act, 1959, shall consist of the following members, namely,—

- (a) a Chairman to be appointed by the State Government;*
- (b) a Vice-Chairman to be appointed by the State Government;*
- (c) the Secretary to the State Government incharge of the Department in which, for the time being, the business relating to the Development Authorities is transacted, ex officio;*
- (d) the Secretary to the State Government, incharge of the Department of Finance, ex officio;*
- (e) the Chief Town and Country Planner, Uttar Pradesh, ex officio;*
- (f) the Managing Director of the Jal Nigam, established under the Uttar Pradesh Water Supply and Sewerage Act, 1975, ex officio;*
- (g) the Mukhya Nagar Adhikari, ex officio;*
- (h) the District Magistrate of every district or any part of which is included in the development area, ex officio;*
- (i) four members to be elected by Sabhasads of the Municipal Corporation for the said city from amongst themselves:*
Provided that any such member shall cease to hold office as such as soon as he ceases to be Sabhasad of the Municipal Corporation;
- (j) such other members not exceeding three as may be nominated by the State Government.*

33. It has been argued that C.T.C.P. is ex officio member of Lucknow Development Authority Board but Awas Bandhu has no role to play in decision making of Lucknow Development Authority regarding sanction of building plans. We have also gone through Section 6 of the Act of 1973, which empowers Government to constitute an Advisory Council for specified purpose. Section 6(1)(2) of U.P. Urban Planning and Development Act, 1973 reads as under:-

6. Advisory Council.—(1) The State Government may, if it thinks fit, constitute an Advisory Council for the purpose of advising the Authority on the preparation of the master plan and on such other matters relating to the planning of development or arising out of, or in connection with, the administration of this Act as may be referred to it by the Authority.

(2) The Advisory Council in respect of a development area referred to in sub-section (3) of Section 4 shall consist of the following members, namely—

(a) the Chairman of the Authority, ex officio who shall be the President;

(b) the Chief Town and Country Planner, Uttar Pradesh and the Chief Engineer, Local Self-Government Engineering Department, Uttar Pradesh, ex officio;

(c) the Director, Medical and Health Services, Uttar Pradesh, or his nominee who shall not be below the rank of a Deputy Director, ex officio;

(d) four representatives of the local authorities having jurisdiction within the limits of the development area, to be elected by their members from among themselves;

(e) the Transport Commissioner, Uttar Pradesh, or his nominee who shall not be below the rank of Deputy Transport Commissioner, ex officio;

(f) the Chairman, State Electricity Board, Uttar Pradesh or his nominee, ex officio;

(g) all the members of the House of the People and the State Legislative Assembly whose constituencies include any part of the development area;

(h) all members of the Council of States and the State Legislative Council who have their residence in the development area;

(i) three members to be nominated by the State Government, one of whom shall represent the interest of labour and one interest of industry and commerce in the development area.

Clearly the Awas Bandhu has not been constituted by the State Government under Section 6 of the Act of 1973.

34. In a recent decision of the Supreme Court in ***Mohd. Mustafa Vs. Union of India reported in 2022 (1) SCC 294.*** The Supreme Court has considered the Meaning and Scope of Judicial Review of Administrative Action and has observed in Paragraphs 15 to 18 as follows:-

15. Judicial review may be defined as a Court's power to review the actions of other branches or levels of Government; especially the Court's power to invalidate legislative and executive actions as being unconstitutional [Black's Law Dictionary] . Power of judicial review is within the domain of the judiciary to determine the legality of administrative action and the validity of legislations and it aims to protect citizens from abuse and misuse of power by any branch of the State [Minerva Mills Ltd. v. Union of India, (1980) 3

SCC 625] . The power of judicial review is a basic feature of the Constitution of India [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225]. Judicial review has certain inherent limitations. However, it is suited more for adjudication of disputes other than for performing administrative functions. It is for the executive to administer law and the function of the judiciary is to ensure that the Government carries out its duties in accordance with the provisions of the Constitution [S.R. Bommai v. Union of India, (1994) 3 SCC 1].

16. The grounds on which administrative action is subject to judicial review are illegality, irrationality and procedural impropriety. The following observations made by Lord Diplock in Council of Civil Service Unions v. Minister for Civil Service [Council of Civil Service Unions v. Minister for Civil Service, 1985 AC 374 : (1984) 3 WLR 1174 (HL)] are apt : (AC pp. 410-11)

“By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the Judges, by whom the judicial power of the State is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that Judges by their training

and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [Edwards v. Bairstow, 1956 AC 14 : (1955) 3 WLR 410 (HL)] , of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an Administrative Tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an Administrative Tribunal at all."

17. The discretionary power vested in an administrative authority is not absolute and unfettered. In Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] , Lord Greene was of the opinion that discretion must be exercised reasonably. Explaining the concept of unreasonableness, Lord Greene stated that a person entrusted with discretion must direct himself properly in law and that he must call his own attention to

the matter which he is bound to consider. He observed that the authority must exclude from his consideration matters which are irrelevant to the matter he is to consider. Lord Greene concluded that if an authority does not obey aforementioned rules, he may truly be said, and often is said, to be acting unreasonably. [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)]

18. *Conditions prompted by extraneous or irrelevant considerations are unreasonable and liable to be set aside by Courts in exercise of its power under judicial review [Ram Avtar Sharma v. State of Haryana, (1985) 3 SCC 189 : 1985 SCC (L&S) 623] . (See State of U.P. v. Raja Ram Jaiswal [State of U.P. v. Raja Ram Jaiswal, (1985) 3 SCC 131] , Sheonandan Paswan v. State of Bihar [Sheonandan Paswan v. State of Bihar, (1983) 1 SCC 438 : 1983 SCC (Cri) 224] , Sant Raj v. O.P. Singla [Sant Raj v. O.P. Singla, (1985) 2 SCC 349 : 1985 SCC (L&S) 435] , Padfield v. Minister of Agriculture, Fisheries & Food [Padfield v. Minister of Agriculture, Fisheries & Food, 1968 AC 997 : (1968) 2 WLR 924 : (1968) 1 All ER 694 (HL)] .) A decision can be arrived at by an authority after considering all relevant factors [Sachidanand Pandey v. State of W.B., (1987) 2 SCC 295] . If the discretionary power has been exercised in disregard of relevant consideration, the Court will normally hold the action bad in law [H.W.R. Wade & C.F. Forsyth, Administrative Law, 10th Edn. (Oxford University Press, 2009).] . Relevant, germane and valid considerations cannot be ignored or overlooked by an executive authority while taking a decision [C.K. Thakker, Administrative Law, Second Edn. (Eastern Book Company, 2012) p. 801.] . It is trite law that Courts in exercise of power under judicial review do not interfere with selections made by expert bodies by reassessing comparative merits of the candidates. Interference with selections is restricted to decisions vitiated by*

bias, mala fides and contrary to statutory provisions. (See Dalpat Abasaheb Solunke v. B.S. Mahajan [Dalpat Abasaheb Solunke v. B.S. Mahajan, (1990) 1 SCC 305 : 1990 SCC (L&S) 80] , Badrinath v. State of T.N. [Badrinath v. State of T.N., (2000) 8 SCC 395 : 2001 SCC (L&S) 13] , National Institute of Mental Health & Neuro Sciences v. K. Kalyana Raman [National Institute of Mental Health & Neuro Sciences v. K. Kalyana Raman, 1992 Supp (2) SCC 481 : 1992 SCC (L&S) 959] , I.P.S. Dewan v. Union of India [I.P.S. Dewan v. Union of India, (1995) 3 SCC 383 : 1995 SCC (L&S) 691] , UPSC v. Hiranyalal Dev [UPSC v. Hiranyalal Dev, (1988) 2 SCC 242 : 1988 SCC (L&S) 484] , M.V. Thimmaiah v. UPSC [M.V. Thimmaiah v. UPSC, (2008) 2 SCC 119 : (2008) 1 SCC (L&S) 409] and UPSC v. M. Sathiya Priya [UPSC v. M. Sathiya Priya, (2018) 15 SCC 796 : (2019) 1 SCC (L&S) 146].

35. This Court taking into account the arguments of the learned Senior Counsel for the Petitioner had put a specific query to the State respondents regarding the Constitution, powers and responsibilities of the Awas Bandhu. The short counter affidavit sworn by the C.T.C.P. does not disclose any role assigned to the Awas Bandhu in sanction of building plans of private properties. Also, the Office Memorandum which we have considered in detail hereinabove, do not assign any role to Awas Bandhu in sanction of Building Plans of commercial buildings. The role assigned to Awas Bandhu is more in the nature of a single window one stop solution for approval of big housing schemes proposed by private developers and also by Urban Development Authorities by bringing together Senior Administrative Officers on one table to handle operational

difficulties in carrying out such schemes. Its function is more in the nature of a facilitator and confined to ironing out the creases and filling in gaps in policy making for promotion of Urban Development Plans. The Awas Bandhu was consulted by the Government without there being any provision in the Act of 1973 for such consultation. Before rendering the advice, the respondent no.8 did not even look into the layout plan of the area as described in the Agreement to Sell executed by the parties. The Agreement to Sell did not mention any zonal/ sector layout plan having been notified for Vineet Khand phase-5. In the absence of a layout plan for the area, the building bye-laws had to be relied upon. The building bye-laws clearly did not provide for setbacks for island plots. It did not make any provision for island plots. It only made a provision for corner plots. The provision for corner plots was clearly not applicable in the case of the petitioner with the plot in question being surrounded on all four sides by roads, which facilitates the movement of air, the provision of unrestricted sunlight, and movement of fire tending vehicles or ambulance in case of urgent evacuation being necessary. The C.T.C.P. had taken into account the existence of roads on all four sides of the plot in question and, therefore, suggested 6m setback in front and 3m setback on the remaining other three sides. In fact, the Awas Bandhu did not examine the matter in detail at all but gave a general advice that since the plot in question was allotted by auction, the terms and conditions of the auction should be strictly followed and if there was no provision for relaxation of norms given in the tender notice, such norms could not be relaxed. There is no

quarrel with regard to such general principle being followed. However, if there are no terms and conditions in the tender notice and there are no terms and conditions in the building bye-laws in relation to island plots, then most certainly the advice of the C.T.C.P. for a suitable provision being made in the building bye-laws to be proposed by the LDA Board with objections being invited from the general public being disposed of before the matter, is notified by the State Government was an appropriate advice to avoid such disputes arising in the future also, in the eventuality when similar island plots in other schemes/sectors of the LDA housing schemes were auctioned in similar manner in the future. The Government, instead of following the well considered advice of the CTCP chose to take the easy way out by outrightly rejecting the case of the petitioner. It is unfortunate that the petitioner after having deposited the entire sale consideration has been unable to raise construction for the past four years. Not only the decision making process was flawed, but also the conclusion arrived at by the Government was one which fails the test of Wednesbury rationality.

36. Consequently, the advice rendered by Awas Bandhu on 20.08.2019, and the decision taken thereafter by the Government on 26.09.2019 are liable to be quashed and are quashed.

37. The decision taken by the Vice-Chairman, Lucknow Development Authority on 04.04.2019 rejecting the Building Plan of the petitioner, has not been brought on

record by the LDA, but we have been orally informed that it is an approval of noting on the file being made by the Executive Engineer, Map Section. The decision was communicated by the respondent no.6 through letter dated 11.04.2019. Such letter therefore shall be treated as the official communication of a decision taken on the file and, therefore deserving to be quashed, and is quashed.

38. The matter is remitted to the Secretary and Vice-Chairman, Lucknow Development Authority to be placed before the LDA Board for suitable amendment in the bye-laws, making a provision for setbacks in Building Plans of commercial buildings on island plots. The Board shall propose amendments in the bye-laws and invite objections and then take a decision and communicate such resolution to the State Government for it to notify the same in the Building bye-laws to avoid confusion in the future. Such exercise shall be completed within a period of four months from the date a certified copy of this order is produced before the respondents.

39. The writ petition stands ***disposed of*** with the aforesaid observations.

[Justice Shree Prakash Singh] [Justice Sangeeta Chandra]

Order Date :- 25/11/2024
Rahul/-